JUDGMENT OF THE COURT (Third Chamber)

13 September 2007 *

In Joined Cases C-439/05 P and C-454/05 P,

APPEALS under Article 56 of the Statute of the Court of Justice, brought on 7 and 16 December 2005,

Land Oberösterreich, represented by G. Hörmanseder, acting as Agent, and by F. Mittendorfer, Rechtsanwalt,

Republic of Austria, represented by H. Dossi and A. Hable, acting as Agents, with an address for service in Luxembourg,

appellants,

the other party to the proceedings being:

Commission of the European Communities, represented by U. Wölker and M. Patakia, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: German.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Klučka (Rapporteur), J.N. Cunha Rodrigues, U. Lõhmus and A. Ó Caoimh, Judges,

Advocate General: E. Sharpston,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 24 January 2007,

after hearing the Opinion of the Advocate General at the sitting on 15 May 2007

gives the following

Judgment

1 By their appeals, the Land Oberösterreich (Province of Upper Austria) and the Republic of Austria seek to have set aside the judgment in Joined Cases T-366/03 and T-235/04 *Land Oberösterreich and Austria* v *Commission* [2005] ECR II-4005 ('the judgment under appeal'), by which the Court of First Instance dismissed their actions seeking the annulment of Commission Decision 2003/653/EC of

2 September 2003 relating to national provisions on banning the use of genetically modified organisms in the region of Upper Austria notified by the Republic of Austria pursuant to Article 95(5) of the EC Treaty (OJ 2003 L 230, p. 34) ('the contested decision').

Legal context

2 The Treaty of Amsterdam, which entered into force on 1 May 1999, substantially amended Article 100a of the EC Treaty and renumbered it as Article 95 EC. Article 95(4) to (6) EC provides:

'4. If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

5. Moreover, without prejudice to paragraph 4, if, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.

6. The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having

verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.

In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.

When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.'

3 Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC (OJ 2001 L 106, p. 1) was adopted on the basis of Article 95 EC. Article 1 provides that its objective is to approximate the laws, regulations and administrative provisions of the Member States and to protect human health and the environment, first, when the deliberate release into the environment of genetically modified organisms ('GMOs') for any other purposes than placing on the market within the European Community is carried out and, second, when GMOs are placed on the market as or in products within the Community.

4 That directive establishes a notification and authorisation regime, which is preceded, as provided for in Article 4(3), by an assessment on a case-by-case basis of potential adverse effects on human health and the environment, which may occur directly or indirectly through gene transfer from GMOs to other organisms.

5 Consents granted, before 17 October 2002, under Council Directive 90/220/EEC of 23 April 1990 on the deliberate release into the environment of genetically modified organisms (OJ 1990 L 117, p. 15), for the placing on the market of a GMO as or in a product may be renewed before 17 October 2006, in accordance with the simplified procedure set out in Article 17(2) to (9) of Directive 2001/18.

Background to the dispute

6 On 13 March 2003, the Republic of Austria notified the Commission of a draft law of the Land Oberösterreich banning genetic engineering (Oberösterreichische Gentechnik-Verbotsgesetz) ('the notified measure') of 2002. That draft law is intended to prohibit the cultivation of seed and planting material composed of or containing GMOs and the breeding and release, for the purposes of hunting and fishing, of transgenic animals. The notification was intended to secure, on the basis of Article 95(5) EC, a derogation from Directive 2001/18. The notification relied on a report entitled 'GMO-free agricultural areas: Design and analysis of scenarios and implementing measures' ('GVO-freie Bewirtschaftungsgebiete: Konzeption und Analyse von Szenarien und Umsetzungsschritten'), compiled by W. Müller ('the Müller report').

7 In response to a referral by the Commission requesting an analysis of the probative value of the scientific information relied on by the Republic of Austria, the European Food Safety Authority ('EFSA') issued an opinion on 4 July 2003, in which it essentially reached the conclusion that that information did not contain any new scientific evidence which could justify banning GMOs in the Land Oberösterreich.

8 Those were the circumstances in which the Commission adopted the contested decision. According to that decision, the Republic of Austria had failed to provide

new scientific evidence or demonstrate that a specific problem in the Land Oberösterreich had arisen following the adoption of Directive 2001/18 which made it necessary to introduce the notified measure. Taking the view that the conditions set out in Article 95(5) EC were not satisfied, the Commission rejected the Republic of Austria's request for derogation.

Proceedings before the Court of First Instance and the judgment under appeal

9 By application lodged at the Registry of the Court of First Instance on 3 November 2003, the Land Oberösterreich brought an action seeking the annulment of the contested decision. That action was registered under number T-366/03.

10 By application lodged at the Registry of the Court of Justice on 13 November 2003, the Republic of Austria brought an action which also sought the annulment of the contested decision. That action was registered under number C-492/03.

11 By order of the Court of Justice of 8 June 2004, Case C-492/03 was referred back to the Court of First Instance. That case was registered under number T-235/04.

12 By decision of the President of the Fourth Chamber of the Court of First Instance of 22 February 2005, after the parties had been heard, Cases T-366/03 and T-235/04 were joined for the purposes of the oral procedure and the judgment, in accordance with Article 50 of the Rules of Procedure of the Court of First Instance.

13 By the judgment under appeal, the Court of First Instance first held that the action brought by the Land Oberösterreich was admissible. It took the view that that *Land* was individually concerned by the contested decision, since it affected a measure of which the Land Oberösterreich was the author and prevented it from exercising, as it saw fit, its own powers conferred on it under the Austrian constitutional system. The Court also held that the Land Oberösterreich was directly concerned by the contested decision, in so far as, although that decision was addressed to the Republic of Austria, that Member State did not exercise any discretion when communicating it to that *Land*.

14 Second, the Court rejected the four pleas in law put forward by the appellants on the following grounds.

15 As regards the first plea in law, alleging infringement of the right to be heard, the Court held, in particular, that the reasoning adopted in Case C-3/00 *Denmark* v *Commission* [2003] ECR I-2643 to justify the non-application of that right to the procedure laid down in Article 95(4) EC could be applied to the procedure laid down in Article 95(5) EC. The Court ruled that the procedure in Article 95(5) EC is also commenced at the request of a Member State seeking the approval of national provisions derogating from a harmonisation measure adopted at Community level. The Court added that the two procedures laid down in Article 95(4) and (5) EC are initiated by the notifying Member State, which may comment on the decision it asks to have adopted, and that those procedures must, in the interest of the notifying Member State and the proper functioning of the internal market, be concluded rapidly.

16 At paragraphs 41 to 44 of the judgment under appeal, the Court stated:

'41 Contrary to what the applicants claim, the fact that the procedure in Article 95(5) EC relates to national measures which are still in draft form does not

mean that it can be distinguished from the procedure laid down in Article 95(4) EC to an extent that the right to be heard can be held to apply to it. The applicants cannot properly argue that the requirement for speed is less great when examining a national measure which has not yet entered into force, so that the Commission could easily extend the six-month deadline laid down in Article 95(6) EC in order to have an exchange of arguments.

42 First, the applicants' argument is contrary to the letter of Article 95(6) EC. That provision applies without distinction to requests for derogation concerning national measures in force, referred to in Article 95(4) EC, and to requests concerning measures in draft form, to which Article 95(5) EC is applicable. Also, the Commission may exercise the option, provided for in the third subparagraph of Article 95(6) EC, of extending the six-month deadline for making a decision only if the complexity of the matter makes it necessary and in the absence of danger for human health. It is apparent therefore that the third subparagraph of Article 95(6) EC does not allow the Commission to defer the end of the six-month period for making a decision only so that the Member State which has submitted a request for derogation under Article 95(5) EC to it can be given the opportunity to state its views.

43 Second, the applicants' argument runs counter to the scheme of Article 95(5) EC. The fact that that provision relates to a national measure which is not yet in force does not diminish the interest in having the Commission rule quickly on the request for derogation which has been submitted to it. The authors of the [EC] Treaty intended that that procedure should be speedily concluded in order to safeguard the applicant Member State's interest in being certain of the applicable rules, and in the interest of the proper functioning of the internal market.

44 On that latter point, it should be pointed out that, in order to avoid prejudicing the binding nature and uniform application of Community law, the procedures laid down in Article 95(4) and (5) EC are both intended to ensure that no

Member State applies national rules derogating from the harmonised legislation without obtaining prior approval from the Commission. In that respect, the rules applicable to national measures notified under Article 95(4) EC do not differ significantly from those which apply to national measures still in draft form notified under Article 95(5) EC. Under both procedures, the measures in question are inapplicable as long as the Commission has not adopted its decision on whether to grant a derogation. Under Article 95(5) EC, that situation arises from the very nature of the measures in question, which are still in draft form. As regards Article 95(4) EC, that situation arises from the subject-matter of the procedure which it lays down. The Court of Justice has pointed out that measures for the approximation of the laws, regulations and administrative provisions of the internal market would be rendered ineffective if Member States retained the right unilaterally to apply national rules derogating from those measures. A Member State is not, therefore, authorised to apply the national provisions notified by it under Article 95(4) EC until after it has obtained a decision from the Commission (see, by analogy with the procedure under Article 100a(4) of the EC Treaty, Case C-41/93 *France* v *Commission* [1994] ECR I-1829, paragraphs 29 and 30, and Case C-319/97 *Kortas* [1999] ECR I-3143, paragraph 28).'

17 As regards the second plea in law, alleging breach of the obligation to state reasons, the Court found, in particular, that the Commission had set out its arguments in a detailed and comprehensive manner, enabling the addressee of the contested decision to be aware of its factual and legal grounds and the Court to review the lawfulness of the decision.

18 In that connection, the Court added at paragraph 56 of the judgment under appeal:

'The Commission relied on three main factors in order to reject the Republic of Austria's request. First of all, it found that that Member State had failed to demonstrate that the notified measure was justified in the light of new scientific

evidence concerning protection of the environment (recitals 63 to 68 of the contested decision). Moreover, the Commission considered that the notified measure was not justified by a problem specific to the Republic of Austria (recitals 70 and 71 of the contested decision). Finally, the Commission rejected the arguments of the Austrian authorities seeking to justify the national measures by recourse to the precautionary principle, taking the view that those arguments were too general and lacked substance (recitals 72 and 73 of the contested decision).'

19 As regards the third plea, alleging infringement of Article 95(5) EC, the Court held, at paragraphs 65 to 67 of the judgment under appeal:

'65 In the contested decision, the Commission rejected the arguments of the Republic of Austria by which it sought to demonstrate that there was a specific problem within the meaning of Article 95(5) EC, on the ground that it was clear from the notification that the small size of farms, far from being specific to the Land Oberösterreich, was a common characteristic, to be found in all the Member States. The Commission also adopted the conclusions of EFSA, in particular those according to which, first, "the scientific evidence presented contained no new or uniquely local scientific information on the environmental or human health impacts of existing or future GM crops or animals" and, second, "no scientific evidence was presented which showed that this area of Austria had unusual or unique ecosystems that required separate risk assessments from those conducted for Austria as a whole or for other similar areas of Europe" (recitals 70 and 71 of the contested decision).

66 It must be stated that the applicants have failed to provide convincing evidence such as to cast doubt on the merits of those assessments as to the existence of a specific problem, but have confined themselves to drawing attention to the small size of farms and the importance of organic production in the Land Oberösterreich.

67 In particular, the applicants have not put forward evidence to rebut EFSA's conclusions that the Republic of Austria failed to establish that the territory of the Land Oberösterreich contained unusual or unique ecosystems that required separate risk assessments from those conducted for Austria as a whole or in other similar areas of Europe. When requested at the hearing to comment on the scale of the problem posed by GMOs in the Land Oberösterreich, the applicants were not able to state whether the presence of such organisms had even been recorded. The Land Oberösterreich stated that the adoption of the notified measure was prompted by the fear of having to face the presence of GMOs because of the announced expiry of an agreement pursuant to which the Member States had temporarily committed themselves no longer to issue consents for those organisms. Such considerations, by their general nature, are not capable of invalidating the concrete findings set out in the contested decision.'

20 The Court stated at paragraph 69 of the judgment under appeal:

'Since the conditions required by Article 95(5) EC are cumulative, it is sufficient that only one of those conditions is not satisfied for the request for derogation to be rejected ... . Since the applicants have failed to demonstrate that one of the conditions required by Article 95(5) EC was satisfied, the third plea must be dismissed as unfounded, without it being necessary to rule on the other complaints and arguments.'

21 The Court found that the fourth plea, alleging breach of the precautionary principle, was irrelevant, since a request had been submitted to the Commission under Article 95(5) EC and it had decided that the conditions for application of that provision were not met. Since the Court found, following examination of the third plea, that the contested decision was not incorrect, it held, at paragraph 71 of the judgment under appeal, that the Commission had no option but to reject the application which was submitted to it.

The appeals

22 By order of the President of the Court of Justice of 29 June 2006, the two appeals were joined for the purposes of the oral procedure and the judgment.

23 In support of their appeals, the Land Oberösterreich and the Republic of Austria raise two pleas for annulment, essentially alleging, first, infringement of the right to be heard and, second, infringement of Article 95(5) EC.

The plea relating to the scope of the right to be heard

Arguments of the parties

24 The appellants criticise the Court of First Instance for repeating the solution adopted by the Court of Justice in *Denmark* v *Commission* in respect of Article 95(4) EC, namely that the right to be heard does not apply, whereas this case relates to Article 95(5) EC. There is a difference between a national provision in respect of which a derogation has been requested under Article 95(4) EC, since that provision is already in force and is therefore, at least potentially, harmful to the internal market, and a national provision still in draft form, in respect of which a derogation has been requested under Article 95(5) EC.

25 First, the appellants observe that, at paragraph 44 of the judgment under appeal, the Court refers to case-law concerning Article 100a of the Treaty. They state that that

provision did not draw a distinction between the maintenance of existing national provisions and the adoption of new national provisions, whereas such a distinction is now made in Article 95(4) and (5) EC.

26 Second, they state that the situation to which Article 95(5) EC relates differs from that to which Article 95(4) EC relates, in so far as, in the case of a national measure in draft form, the interest of the proper functioning of the internal market does not require any particular speed from a procedural point of view, so that the Commission could easily extend the six-month deadline laid down in Article 95(6) EC and allow an exchange of views to take place.

27 In response, the Commission takes the view that, by referring to the case-law cited in paragraph 44 of the judgment under appeal, the Court of First Instance relied only on one aspect of the case-law relating to Article 95(4) and (5) EC, namely that, in the two instances referred to in those paragraphs, a Member State may not derogate from a harmonisation measure without the Commission's prior authorisation. The Commission is also of the opinion that, even if a law has not progressed beyond the draft stage, it may be desirable to have the situation clarified as soon as possible.

Findings of the Court

28 Article 95 EC provides that, following the adoption of measures for the approximation of the legislation of the Member States, those States are required to notify national provisions which derogate from those measures to the Commission for its approval. Article 95(4) EC relates to the maintenance of national measures which predate the harmonisation measures and Article 95(5) EC relates to derogating national measures that the Member State wishes to introduce.

29 The procedures laid down in that article are initiated by a Member State notifying derogating national provisions to the Commission, followed by a stage in which the Commission carries out an assessment of the information in the file to determine whether the requisite conditions are fulfilled, and ends with the final decision approving or rejecting those national provisions. The Commission is not to reach a decision until it has verified that the national provisions are not a means of arbitrary discrimination or a disguised restriction on trade between Member States (see Case C-512/99 *Germany* v *Commission* [2003] ECR I-845, paragraph 44).

30 Moreover, it is apparent from the case-law of the Court that, having regard to the specific features of the procedure laid down in Article 95(4) EC, the principle of the right to be heard does not apply to that procedure (*Denmark* v *Commission*, paragraph 50).

31 As regards the procedure laid down in Article 95(5) EC, the introduction of new national provisions must be based on new scientific evidence relating to the protection of the environment or the working environment by reason of a problem specific to that Member State arising after the adoption of the harmonisation measure (see, to that effect, *Denmark* v *Commission*, paragraph 57).

32 The requirement that new scientific evidence must be adduced in support of the request may, in this respect, lead the Commission, as part of its assessment of the merits of that request, to have recourse to outside experts in order to obtain their views on that evidence, and those views will serve as a basis for the final decision.

33 Thus, the Commission itself acknowledged that it was not in a position, in the present case, to assess alone the scientific evidence in the Müller report and stated that, as a consequence, it had to request an opinion from EFSA before taking a decision under Article 95(5) EC.

34 It must be ascertained whether, as the appellants submit, the right to be heard should have been applied in such a case or whether, as was held in *Denmark* v *Commission*, the right to be heard did not apply as regards Article 95(4) EC.

35 In that respect, the principle of the right to be heard, whose observance is ensured by the Court, requires a public authority to hear interested parties before adopting a decision which concerns them (Case C-315/99 P *Ismeri Europea* v *Court of Auditors* [2001] ECR I-5281, paragraph 28, and *Denmark* v *Commission*, paragraph 45).

36 The Court has consistently held that the principle of the right to a fair hearing, to which the principle of the right to be heard is closely linked, applies not only to citizens but also to the Member States. As regards the latter, that principle has been recognised in the context of proceedings brought by a Community institution against Member States (see, inter alia, *Denmark* v *Commission*, paragraph 46). It has been held that the right to a fair hearing is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law and must be guaranteed even in the absence of any rules (see, inter alia, Joined Cases C-48/90 and C-66/90 *Netherlands and Others* v *Commission* [1992] ECR I-565, paragraph 44; Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, paragraph 99; and Case C-287/02 *Spain* v *Commission* [2005] ECR I-5093, paragraph 37).

37 However, it is not apparent, first, from the wording of Article 95(5) EC, that the Commission is required to hear the notifying Member State before it takes its decision to approve or reject the national provisions in question. Taking into consideration the specific features of that procedure, the Community legislature merely laid down, in Article 95 EC, the conditions to be fulfilled in order to obtain a

Commission decision, the period within which the Commission must issue its decision to approve or reject and possible extensions to that period.

38 Next, the procedure laid down in Article 95(5) EC, like indeed the one laid down in Article 95(4) EC, is initiated, as set out in paragraph 29 of this judgment, not by a Community or national institution but by a Member State, and the Commission's decision is taken only in response to that initiative. In its request, the Member State is at liberty to comment on the national provisions it asks to have adopted, as is quite clear from Article 95(5) EC, which requires the Member State to state the grounds on which its request is based.

39 Furthermore, the Commission must be able, within the prescribed period, to obtain the information which proves necessary without being required to hear the notifying Member State before it takes its decision (see, concerning the procedure laid down in Article 95(4) EC, which is subject to the same time-limits as those applicable to the procedure laid down in Article 95(5) EC, *Denmark* v *Commission*, paragraph 48).

40 It must be emphasised that, according to the second subparagraph of Article 95(6) EC, national derogating provisions are deemed to have been approved if the Commission does not take a decision within a specified period. In addition, under the third subparagraph of Article 95(6) EC, no extension of that period is allowed if the matter is not complex and where there is a danger for human health.

41 The authors of the Treaty intended, in the interest of both the notifying Member State and the proper functioning of the internal market, that the procedure laid down in that article should be swiftly concluded. That objective would be difficult to reconcile with a requirement for prolonged exchanges of information and observations.

42 It should be added, lastly, that, by referring, in paragraph 44 of the judgment under appeal, to case-law relating to the procedure under Article 100a(4) of the Treaty, the Court of First Instance merely sought to highlight the existence of the condition imposed on the Member State in order for it to be able to derogate from a harmonising measure adopted at Community level, namely the requirement to obtain prior approval from the Commission. That condition arises under Article 95(4) and (5) EC, since it must be satisfied both by the Member State which notifies rules already in force pursuant to Article 95(4) EC and by a Member State which notifies a draft law under Article 95(5) EC. The measures to which those two paragraphs of Article 95 relate are therefore governed in that connection by the same principles, as the Advocate General stated at point 85 of her Opinion.

43 Finally, in the light of the specific features of the procedure laid down in Article 95(5) EC, the similarities of that procedure with the one laid down in Article 95(4) EC and the common objective of those two paragraphs, which is to enable Member States to obtain derogations from harmonisation measures, there is no need to adopt a solution different from that adopted in respect of Article 95(4) EC. Consequently, the Commission is not required to observe the right to be heard before taking a decision under Article 95(5) EC (see, to that effect, as regards Article 95(4) EC, *Denmark* v *Commission*, paragraph 50).

44 The Court of First Instance was therefore correct to hold that the right to be heard should not apply to the procedure laid down in Article 95(5) EC.

45 The plea alleging infringement of the right to be heard must therefore be rejected.

The plea alleging infringement of Article 95(5) EC

Arguments of the parties

46 The appellants state first of all that the judgment under appeal examines the plea alleging infringement of the Treaty only to the extent of verifying the condition relating to the existence of a specific problem and that, consequently, the Court of First Instance infringed their right to be heard.

47 The Republic of Austria adds that new scientific evidence constitutes an essential element in Article 95(5) EC and that, even in the assessment of the condition relating to the existence of a problem specific to the Member State concerned, namely the issue of coexistence of GMOs and natural crops, the Court should not have overlooked the inadequacy of the risk assessment and the precautionary principle. In its view, the Commission did not carry out a complete scientific analysis of the risks, nor did it take account of the right to be heard and, lastly, it failed to fulfil its obligation to state reasons.

48 Next, the appellants criticise paragraph 67 of the judgment under appeal in so far as, in the present case, it takes as a basis for the absence of a specific problem for the purposes of Article 95(5) EC, the fact that it has not been proved that GMOs are present in the Land Oberösterreich. In that respect, the judgment under appeal is inconsistent with the obligation to take as a basis a high level of protection when adopting health, safety, environmental and consumer protection measures on the basis of Article 95 EC.

49 The Republic of Austria adds that, by interpreting too restrictively the conditions relating to the existence of a specific problem, by evaluating insufficiently the risks and the new scientific evidence and by failing to have regard to the precautionary principle, the Commission and the Court of First Instance had a decisive influence on the outcome of the dispute and harmed its interests.

50 In response, the Commission submits that the question whether the Court of First Instance appropriately assessed the circumstances of the dispute before it seeks to ascertain whether the Court committed an infringement of Community law and not whether it committed a procedural irregularity on the ground of an inadequate statement of reasons.

51 The Commission states that the existence of new scientific evidence and protection of the environment are not among the conditions which constitute a specific problem but are placed on an equal footing with that problem, since all the conditions laid down in Article 95(5) EC are cumulative. Accordingly, the Court was right to dismiss the action after finding that the condition relating to the existence of a specific problem had not been fulfilled.

52 As regards the precautionary principle, the Commission submits that, at paragraph 71 of the judgment under appeal, the Court correctly explained the reasons for rejecting the plea alleging breach of that principle and that the Republic of Austria has not, at least in an explicit and detailed manner, disputed that part of the judgment.

53 The Commission also takes the view that the arguments relating to the Commission's alleged omissions in the procedure for the examination of the request and the arguments relating to the principle of the right to a fair hearing are not relevant for determining the question whether the judgment under appeal is vitiated by an error of law. As regards the principle of the right to a fair hearing, the

arguments put forward in this respect are inadmissible since they are unsubstantiated and, in any event, manifestly unfounded in so far as the Republic of Austria's right to a fair hearing was not limited in any way in the proceedings before the Court of First Instance.

54 The appellants submit, lastly, that the procedural irregularity which they have pleaded is based on an error of assessment and, consequently, also constitutes a plea alleging infringement of Community law. In their view, the term 'specific' must not be regarded as synonymous with the term 'unique'. The problems to which Article 95(5) EC relates should be understood as being particular problems, but not on any basis as unique problems which are specific to a single Member State or to a single region. The appellants take the view that, by misconstruing the meaning of the term 'specific', the Court of First Instance failed to examine the other conditions laid down in Article 95(5) EC and infringed Community law in this respect.

55 In response, the Commission submits that the Court of First Instance was under no obligation whatsoever to examine in detail the condition relating to the existence of a specific problem and submits that the appellants failed to satisfy the burden of proof imposed on them under Article 95(5) EC, in so far as they confined themselves to basing their argument on the small size of farms and on the importance of organic production. According to the Commission, it is the existence of an unusual or unique ecosystem, rendering necessary a risk assessment separate from that carried out under Directive 2001/18 for other similar regions in Europe, which, in the context of a specific problem, justifies the derogation from that directive. The Commission states that the appellants have failed to adduce the necessary evidence in that connection.

Findings of the Court

56 First of all, it should be pointed out that the lawfulness of national measures notified under Article 95(5) EC is closely linked to the assessment of the scientific evidence put forward by the notifying Member State.

57 That provision requires that the introduction of national provisions derogating from a harmonisation measure be based on new scientific evidence relating to the protection of the environment or the working environment made necessary by reason of a problem specific to the Member State concerned arising after the adoption of the harmonisation measure, and that the proposed provisions as well as the grounds for introducing them be notified to the Commission (Case C-512/99 *Germany* v *Commission*, paragraph 80).

58 Those conditions are cumulative in nature and must therefore all be satisfied if the derogating national measures are not to be rejected by the Commission (see *Germany* v *Commission*, paragraph 81).

59 In this respect, it should be noted that that cumulative nature was not contested by the parties in the present case.

60 Next, in their appeals, the appellants contested the judgment under appeal in particular in so far as the Court of First Instance rejected their arguments relating to the assessments by the Commission as regards the condition relating to the existence of a problem specific to the notifying Member State.

61 At paragraphs 66 and 67 of the judgment under appeal, the Court held that the appellants had failed to provide convincing evidence such as to cast doubt on the merits of those assessments and had confined themselves to drawing attention to the small size of farms and the importance of organic production in the Land Oberösterreich. The Court added, in particular, that the appellants did not put forward evidence to rebut EFSA's conclusions that the Republic of Austria had failed to establish that the territory of the Land Oberösterreich contained unusual or unique ecosystems that required separate risk assessments from those conducted for Austria as a whole or in other similar areas of Europe. According to the Court, the considerations put forward by the appellants, by their general nature, were not capable of invalidating the concrete findings set out in the contested decision.

62 In that decision, the Commission found that the Republic of Austria had failed to show that there was a specific problem, in the Land Oberösterreich, for the purposes of Article 95(5) EC, arising after the adoption of Directive 2001/18.

63 That decision followed an EFSA opinion which found that there was no scientific evidence demonstrating the existence of a specific problem. That agency took the view that no scientific evidence proving the existence of unusual or unique ecosystems that required separate risk assessments from those conducted for Austria as a whole or in other similar areas of Europe had been submitted. The agency found that the Müller report did not provide any new information capable of calling into question the provisions of Directive 2001/18.

64 In that respect, the Court of First Instance does not appear to have erred in law by stating that EFSA's findings concerning the absence of scientific evidence demonstrating the existence of a specific problem had been taken into consideration by the Commission.

65 Moreover, contrary to what the appellants claim, the Court did not misconstrue the meaning of the term 'specific' referred to in Article 95(5) EC, since it did not hold that, for the conditions set out in that provision to be fulfilled, only the existence of a 'unique' problem, a more restrictive notion than a 'specific' problem, had to be demonstrated.

66 In this respect, in the judgment under appeal, the Court repeated the Commission's findings and those of EFSA in holding that the Republic of Austria had not adduced any scientific evidence proving, in particular, the existence of 'unusual' ecosystems.

67 In the German version of the contested decision, which is authentic, reference is made to the 'ungewöhnliches Ökosystem' and, in the EFSA opinion written in English, to 'unusual ecosystems', which removes any significance from the terms 'einzigartiges' and 'unique' in the German version of the contested decision and in the EFSA opinion respectively.

68 It should be added that, by taking the view that the appellants had failed to provide convincing evidence such as to cast doubt on the merits of those assessments concerning the absence of scientific evidence to demonstrate the existence of a specific problem and, therefore, that one of the conditions provided for in Article 95(5) EC had not been satisfied, the Court of First Instance does not appear to have erred in law in this respect either.

69 Finally, it follows from the case-law that, since the conditions laid down in Article 95(5) EC are cumulative, there is no need to consider all those conditions if it is found that one of them has not been fulfilled (see, to that effect, Case C-512/99 *Germany* v *Commission*, paragraph 88).

70 The Court of First Instance was therefore right, having found that the condition relating to the existence of a problem specific to the Member State was not fulfilled, to dismiss the actions without seeking to ascertain whether the other conditions were satisfied.

71 The appellants' arguments concerning the fact that the Court confined itself to analysing the condition relating to the existence of a problem specific to the Member State, and those relating to the right to be heard, the obligation to state reasons and the right to a fair hearing are, therefore, not well-founded.

72 In those circumstances, it must be held that, by dismissing the actions, the Court of First Instance did not infringe Article 95(5) EC.

73 Consequently, the appellants' second plea is not well-founded and the appeals must be dismissed.

Costs

74 Under Article 69(2) of the Rules of Procedure, which applies to appeals by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs against the Land Oberösterreich and the Republic of Austria and the latter have been unsuccessful in their pleas, they must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

1. **Dismisses the appeals;**

2. **Orders the Land Oberösterreich and the Republic of Austria to pay the costs.**

[Signatures]